

JAN 5 1994

No. 93-445

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

LENARD RAY BEECHAM

and

KIRBY LEE JONES,

v.

Petitioners,

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

JOINT APPENDIX

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DOCKET ENTRIES

United States v. Lenard Ray Beecham

Date	PROCEEDINGS
10/15/91	Indictment filed.
1/8/92	Jury Trial at Raleigh before Judge DuPree. Jury present, sworn and impaneled. Jury trial began. Opening statement by Government. Defense presents opening statement. Government presents evidence.
1/9/92	Jury trial continues. Government rests evidence. Defense moves for judgment of acquittal of all charges of possession of firearms by felon—overruled. Defendant presents evidence. Government presents closing argument. Defense presents closing argument. Rebuttal argument by Government. Jury instructions given.
1/9/92	Defendant's Motion for Judgment of Acquittal of all Charges of Possession of Firearms by Felon.
1/10/92	Jury trial continues—jury deliberates—jury verdict as follows: <div style="margin-left: 40px;">Guilty as to counts 1, 3, 5, 7 & 11</div> <div style="margin-left: 40px;">Guilty as to counts 2, 6, 8, 9 & 10</div> <div style="margin-left: 40px;">Guilty as to count 4</div>
1/10/92	Memorandum of Law in Opposition to Defendant's Motion for Judgment of Acquittal of All Charges of Possession of Firearm by Felon.
1/15/92	Motion <i>Non Obstante Veridicto</i> to Set Aside Verdicts and for Judgments of Acquittal of Possession of Firearms By Felon and False Statement to Acquire Firearm.
1/15/92	Supplemental Response to Motion for Judgment of Acquittal of All 18 U.S.C. § 922(g) Charges and To Set Aside Guilty Verdicts.
1/16/92	Motion Hearing—Judge DuPree—Raleigh. Government and Defense present oral argument and rebuttal arguments. Court to review and then to make written decision.

Date	PROCEEDINGS
1/24/92	Order—re: Motion for Judgment of Acquittal—Defendant's Motion for Judgment of Acquittal in regard to counts 1, 3, 4, 5, 7 & 11 is granted—(Dupree, J.).
2/24/92	Notice of Appeal filed in United States Court of Appeals for the Fourth Circuit
6/1/92	Judgment in a Criminal Case—(offenses after 11/1/87) \$250.00 special assessment (Counts 2, 6, 8, 9 & 10) (other Counts dismissed). Sentencing before Judge Britt. 18 months imprisonment on each count to run concurrently. Defendant to be provided with mental health treatment. Defendant to be allowed to serve his sentence at Federal Prison Camp—Seymour Johnson AFB-Goldsboro. Defendant allowed to report before 2:00 p.m. on date designated by United States Marshal. 36 months supervised release—each count to run concurrently. Defendant must report within 72 hours to United States Parole Office in district upon release. Defendant must not possess a firearm or destruction device. Defendant must not incur new credit charges or open additional lines of credit without the approval of the parole officer. Defendant must provide parole officer with access to any required financial information. \$3,000 fine—without interest—to be paid in equal monthly installments during period of probation—to begin and continue during incarceration. No restitution ordered—no identifiable victim. Statement of Reasons.
6/3/92	Order—judgment in this matter entered on 6/1/92 is hereby amended on page 1 to reflect that Counts 1, 3, 4, 5, 7 & 11 were dismissed by the court upon motion of the defendant. Except as herein modified, the judgment is, in all respects, ratified and confirmed.
6/10/92	Notice of Appeal.

Date	PROCEEDINGS
6/2/93	Unpublished opinion of Court of Appeals—Affirmed in part, reversed in part and remanded by unpublished <i>per curiam</i> opinion.
6/28/93	Judgment of Court of Appeals—The court affirmed in part and reversed in part the judgment of the District Court. The cases are remanded to the District Court with Instructions.
6/29/93	Order of Court of Appeals—It is ordered that the petition for rehearing and suggestion for rehearing <i>en banc</i> are denied.
9/20/93	Defendant files Petition for a Writ of Certiorari in the United States Supreme Court.
10/26/93	Resentencing at Raleigh before Judge Britt: Defendant present with counsel. Resentencing pursuant to remand from 4th Circuit. All counts included 1-11. Bureau of Prisons—21 months, Counts 1-11 all to run concurrently. Supervised Release—36 months Counts 1-11, all to run concurrently. Fine \$3,000.00. Special Assessment—\$50.00 each count, total \$550.00. Payment schedule to be established during imprisonment pursuant to inmate financial responsibility program all remaining penalties to be paid under United States Parole Office supervision provided all penalties are paid before lapse of supervised release. Motion to release pending appeal is denied.
10/26/93	Judgment in a Criminal Case: Bureau of Prisons 21 months Counts 1-11, all concurrent. Supervised release, 36 months Counts 1-11 concurrent. Fine \$3,000.00. Special Assessment—\$550.00, interest waived. Fine to be paid pursuant to inmate financial responsibility program and under supervision of United States Parole Office. Statement of reasons.
11/15/93	United States Supreme Court grants Writ of Certiorari.

DOCKET ENTRIES

United States v. Kirby Lee Jones

Date	PROCEEDINGS
3/3/92	Indictment filed.
4/28/92	Defendant's Motion to Dismiss Indictment.
6/18/92	Government files Response to Defendant's Motion to Dismiss Indictment.
10/21/92	United States Magistrate issues Proposed Findings of Fact and Recommendation for Disposition.
11/4/92	District Court Order granting Defendant's Motion to Dismiss Indictment.
11/30/92	Government files notice of appeal in United States Court of Appeals for the Fourth Circuit.
5/24/93	Court of Appeals enters opinion reversing District Court's Order and remanding with directions.
6/4/93	Court of Appeals—Defendant files Motion to Stay Mandate Pending Application for Certiorari.
6/14/93	Court of Appeals denies Motion to Stay Mandate Pending Application for Certiorari.
7/9/93	Court of Appeals amends decision by Order.
7/19/93	Defendant enters into Plea Agreement.
7/22/93	District Court stays further action on plea agreement pending exhaustion of Defendant's appeals.
9/20/93	Defendant files Petition for a Writ of Certiorari in United States Supreme Court.
11/15/93	United States Supreme Court grants Writ of Certiorari.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

No. 91-84-01-CR-5 BR

UNITED STATES OF AMERICA

v.

LENARD RAY BEECHAM

INDICTMENT

[Filed Oct. 15, 1991]

The Grand Jury charges that:

COUNT ONE

On or about November 20, 1990, in the Eastern District of North Carolina, LENARD RAY BEECHAM, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, a firearm, that is, a Browning Hi-Power 9 mm., semi-automatic pistol, serial number 245PN69407, in violation of Title 18, United States Code, Sections 922(g)(1).

COUNT TWO

On or about November 20, 1990, in the Eastern District of North Carolina, LENARD RAY BEECHAM, de-

fendant herein, engaging in the business of dealing in firearms without a license, knowingly received a firearm, that is, a Browning Hi-Power 9 mm., semi-automatic pistol, serial number 245PN69407, which moved in interstate commerce, in violation of Title 18, United States Code, Sections 922(a)(1)(A).

COUNT THREE

On or about December 22, 1990, in the Eastern District of North Carolina, the defendant, LENARD RAY BEECHAM, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, a firearm, that is, a Stoen (IGA), .410 gauge double barreled shotgun, Coachgun model, serial number 313170, in violation of Title 18, United States Code, Sections 922(g)(1).

COUNT FOUR

On or about December 22, 1990, in the Eastern District of North Carolina, LENARD RAY BEECHAM, defendant herein, in connection with his acquisition of a firearm that is, a Stoen (IGA), .410 gauge double barreled shotgun, Coachgun model, serial number 313170, from Thompson's Firearms and Fishing Supplies, Raleigh, North Carolina, a licensed dealer, knowingly made a false and fictitious written statement to Thompson's Firearms and Fishing Supplies, which statement was likely to deceive Thompson's Firearms and Fishing Supplies, as to a fact material to the lawfulness of such acquisition of the said firearm to the defendant under chapter 44 of Title 18, United States Code, in that the defendant represented that he had not been convicted in any court of a crime punishable by a term of imprisonment exceeding one year, when in fact, as the defendant then well knew, he had been so convicted, in violation of Title 18, United States Code, Sections 922(a)(6).

COUNT FIVE

On or about January 31, 1991, in the Eastern District of North Carolina, the defendant, LENARD RAY BEECHAM, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, a firearm, that is, an Ithaca, model 1911A1, .45 caliber, semi-automatic pistol, serial number 822430, in violation of Title 18, United States Code, Sections 922(g)(1).

COUNT SIX

On or about January 31, 1991, in the Eastern District of North Carolina, LENARD RAY BEECHAM, defendant herein, engaging in the business of dealing in firearms without a license, knowingly received a firearm, that is, an Ithaca, model 1911A1, .45 caliber, semi-automatic pistol, serial number 822430, which moved in interstate commerce, in violation of Title 18, United States Code, Sections 922(a)(1)(A).

COUNT SEVEN

On or about February 2, 1991, in the Eastern District of North Carolina, the defendant, LENARD RAY BEECHAM, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, a firearm, that is, a Smith & Wesson, .44 magnum, model 29, blue steel, revolver, serial number AZE5222, in violation of Title 18, United States Code, Sections 922(g)(1).

COUNT EIGHT

On or about February 2, 1991, in the Eastern District of North Carolina, LENARD RAY BEECHAM, defendant herein, engaging in the business of dealing in firearms without a license, knowingly received a firearm, that is, a Smith & Wesson, .44 magnum, model 29, blue steel,

revolver, serial number AZE5222, which moved in interstate commerce, in violation of Title 18, United States Code, Sections 922(a)(1)(A).

COUNT NINE

On or about February 21, 1991, in the Eastern District of North Carolina, LENARD RAY BEECHAM, defendant herein, engaging in the business of dealing in firearms without a license, knowingly sold a firearm, that is, a Smith & Wesson, .44 magnum, model 29, blue steel, revolver, serial number AZE5222, which moved in interstate commerce, in violation of Title 18, United States Code, Sections 922(a)(1)(A).

COUNT TEN

On or about the year 1990, in the Eastern District of North Carolina, LENARD RAY BEECHAM, defendant herein, engaging in the business of dealing in firearms without a license, knowingly sold firearms, that is, a 9 mm., semi-automatic pistol, serial number unknown, and a 12 gauge Browning pump shotgun, serial number unknown, which moved in interstate commerce, in violation of Title 18, United States Code, Sections 922(a)(1)(A).

COUNT ELEVEN

On or about March 14, 1991, in the Eastern District of North Carolina, the defendant, LENARD RAY BEECHAM, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, firearms, that is, a Browning, 12 gauge, pump-action shotgun, serial number 22706PT152, a Winchester, model 9422M, lever action, .22 magnum caliber rifle, serial number F474908, a Titan, Tigress, .25 caliber, semi-automatic pistol, serial number DE17468, and quantities of ammunition, .380 auto., .25 auto., 9mm., .44 magnum, .45 auto., 12 gauge, .30 carbine, .30-06

Springfield, .22 long rifle, .357 magnum, and .41 magnum calibers, in violation of Title 18, United States Code, Sections 922(g)(1).

A TRUE BILL

/s/ Illegible
Foreman

Date: 10/15/91

MARGARET PERSON CURRIN
United States Attorney

By: /s/ Richard B. Conely, Sr.
RICHARD B. CONELY, SR.
Assistant United States Attorney
Criminal Division

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

No. 91-84-01-CR-5

UNITED STATES OF AMERICA,
Plaintiff

vs.

LENARD RAY BEECHAM,
Defendant

Defendant, Lenard Ray Beecham, was convicted on eleven counts of violations of 18 U.S.C. § 922(g)(1), 18 U.S.C. § 922(a)(1), and 18 U.S.C. § 922(a)(6). The matter is presently before the court on defendant's motion to set aside the jury verdict as to counts one, three, four, five, seven and eleven based on the renewal of his motion for judgments of acquittal as to those counts.

Count four arises under 18 U.S.C. § 922(a)(6) and deals with knowingly making a false statement to a firearms dealer with respect to the purchase of a firearm. Counts one, three, five, seven, and eleven arise under 18 U.S.C. § 922(g)(1) and relate to unlawful possession of a firearm by a convicted felon.

The issue of contention in regard to each of these counts is whether Beecham actually had a prior conviction at the time he violated these two statutes as that term is defined under federal law. The question is crucial because a prior conviction is an essential element of both statutes and therefore the jury's verdicts as to those

counts cannot stand unless Beecham does in fact have a prior conviction for purposes of these statutes.

There is no dispute over the fact that in 1979 Beecham was convicted for a violation of 18 U.S.C. § 922(h), a felony offense, in the United States District Court for the Western District of Tennessee. However, defendant contends that since Beecham has served the sentences imposed upon his conviction of the predicate offense and has been granted a final release from incarceration and supervision, he has had his civil rights fully restored and therefore no longer has a prior conviction as that term is defined for purposes of Section 922(g)(1) and Section 922(a)(6). The government, conversely, argues that Beecham has not had these rights fully restored and that therefore he currently has a prior conviction under federal law.

I. *Which Definition of "Conviction" Applies?*

18 U.S.C. § 921(a)(20) defines the term "conviction" within the meaning of Section 922(g)(1) and Section 922(a)(6), stating, in pertinent part, as follows:

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20) (Supp. 1991).

This statutory provision, while certainly not unambiguous, is the governing definition as to what constitutes a prior conviction for purposes of Sections 922(g)(1) and 922(a)(6). However, Section 921(a)(20) was

not enacted until May 19, 1986 and did not become effective until 180 days after that date. Consequently, the government contends that this provision does not apply to the case *sub judice* since the predicate offense that constitutes Beecham's prior "conviction" took place in Tennessee federal court in 1979, well before the enactment of Section 921(a)(20).

Prior to the 1986 enactment of the amended version of Section 921(a)(20), the term "conviction" was not defined by statute and the controlling definition of the term was laid down by the United States Supreme Court in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983). In *Dickerson* the Court held that the term "convicted" was "a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State." *Id.* at 111-112. The Court went on to rule that a state's expungement of a defendant's criminal record would have no effect on that defendant's conviction under the federal firearms statutes. *Id.* at 113-117.

As support for its argument that the *Dickerson* definition of "conviction" should be applied to the case at bar rather than the Section 921(a)(20) definition, the government cites *United States v. Brebner*, No. 89-30100, 1991 U.S. App. WESTLAW 256177 (9th Cir., December 9, 1991), a recent case in which the Ninth Circuit refused to apply Section 921(a)(20) retroactively. However, in that case the *actions constituting a violation of the federal firearms statutes* had occurred prior to the effective date of Section 921(a)(20). In other words the Ninth Circuit's refusal to apply Section 921(a)(20) retroactively was *not* due to the fact that the *predicate offenses* took place before the effective date of the statute. In the case *sub judice*, Beecham's violations of Sections 922(g)(1) and 922(a)(6) occurred well after the effective date of Section 921(a)(20). Therefore, the fact that Beecham's predicate offenses took place prior to this date

is irrelevant and will not bar the application of Section 921(a)(20).

II. Which Jurisdiction's Law is Controlling?

Having determined that Section 921(a)(20) does apply, the next question is whether Tennessee law—the law of the jurisdiction in which Beecham's predicate offense occurred—or North Carolina law—the law of the jurisdiction in which Beecham's present conviction took place—is applicable. Case law demonstrates, however, that the relevant jurisdiction for purposes of this inquiry is the state in which the predicate offenses occurred. The most direct precedent is *United States v. Essick*, 935 F.2d 28 (4th Cir. 1991), in which the Fourth Circuit stated the following:

[I]n every § 922(g)(1) prosecution, the court must refer to the laws of the jurisdiction in which such purported *predicate* conviction occurred. This inquiry requires an analysis of whether and to what extent the jurisdiction in which the prior conviction occurred "restores the civil rights" of ex-felons.

Essick, 935 F.2d at 30 (emphasis added).

Furthermore, in *United States v. McBryde*, 938 F.2d 533 (4th Cir. 1991), the Fourth Circuit removed all doubt that the rule laid down in *Essick* was the governing rule in this circuit. In *McBryde*, the defendant was convicted in a South Carolina federal court for a violation of Section 922(g)(1). His predicate offense was a state court conviction in North Carolina. *Id.* at 534. The Fourth Circuit held that the sole question in that case was whether the restoration of the defendant's civil rights under North Carolina law—the law of the predicate offense state—would make him immune from prosecution under Section 922(g)(1). The court answered that question in the affirmative. *Id.* at 534-36.

Thus, given the rule articulated by the Fourth Circuit in *Essick* and applied in *McBryde*, the court concludes

that Tennessee's civil rights restoration statute is applicable rather than North Carolina's statute.¹

III. *Did the Government Meet Its Burden of Proof in Regard to the Prior "Conviction" Element of Sections 922(g)(1) and 922(a)(6)?*

The current Tennessee statute dealing with restoration of civil rights for felons provides that all persons who have been deprived of their rights of citizenship by a court of law may have these rights restored upon, *inter alia*, final release from incarceration or probation. Tenn. Code Ann. § 40-29-105(b)(1)(C) (1991). The statute goes on to say that persons eligible for restoration of their rights can request a certificate of restoration and are entitled to receive that certificate from the pardoning authority or an agent or officer of the supervising or incarcerating authority. Tenn. Code Ann. § 40-29-105(b)(3)(A-B) (1991).

Section 40-29-105 expressly states that it applies only to felons convicted of infamous crimes *after* July 1, 1986 and that the restoration provisions applicable to felons convicted of infamous crimes *prior* to July 1, 1986 are contained in Sections 40-29-101 through 40-29-104. Since Beecham's predicate offenses clearly arose prior to July 1, 1986, any restoration of his rights would be governed by this earlier statute. Section 40-29-101 provides that a person deprived of his rights of citizenship may petition the circuit court for restoration of those rights. Tenn. Code Ann. § 40-29-101 (1991). The subsequent pro-

¹ The government argues that because Beecham's prior conviction was in federal court neither Tennessee law nor North Carolina law but rather federal law should govern as to whether Beecham has had his civil rights restored. However, at least two circuits have rejected this view. See *United States v. Edwards*, 946 F.2d 1347 (8th Cir. 1991); *United States v. Geyler*, 932 F.2d 1330 (9th Cir. 1991). Since the government has cited no cases that express a contrary view on this issue, the court sees no reason to depart from these precedents.

visions of the statute elaborate on this procedure. See Tenn. Code Ann. §§ 40-29-101 through 40-29-104.

A fundamental tenet of our constitutional system is the requirement that in a criminal trial the government has the burden of proof in regard to each element of the crime. See *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Consequently, the government had the burden of proving beyond a reasonable doubt that Beecham did in fact have a prior "conviction" as defined in regard to the firearms statutes. Therefore, the government was obligated to show that Beecham had not had his civil rights restored under Tennessee law. While the law is clearly established that the burden of proof is on the defendant in regard to an affirmative defense,² a defense that relates to an element of the crime is not an affirmative defense and, therefore, the government must prove it beyond a reasonable doubt. The government argues that the restoration of rights issue is either an affirmative defense or a statutory exception and that therefore the burden was on defendant in regard to this question.

In *Essick*, *supra*, the Fourth Circuit dealt with a similar burden of proof issue in relation to Section 922(g)(1). In that case the contested issue involved the question of whether Essick's federal firearms conviction occurred within five years of his release from state supervision, a question that was crucial under North Carolina law for purposes of determining whether a prior "conviction" existed. There—as here—the government made the argument that all it needed to do to prove a prior "conviction" in a Section 922(g)(1) trial was to show that at some time in the past the defendant had been convicted of a felony and that the question of whether the defendant's civil rights had been restored was a defense for which the defendant had the burden of proof. *Essick*, 935 F.2d at 31.

² See *Patterson v. New York*, 432 U.S. 197 (1977).

The Fourth Circuit refused to adopt this view, holding that "[b]ecause a prior 'conviction,' *i.e.*, one for which the civil right to possess a firearm has *not* been restored, is an element of a § 922(g)(1) violation, the government's proof failed" insofar as they failed to put forth evidence showing that the Section 922(g)(1) violation had occurred within five years of the predicate offense. *Id.* Thus, *Essick* clearly rejects the government's argument that the restoration of rights question is not an essential element of a Section 922(g)(1) violation that must be established during the prosecution's case beyond a reasonable doubt. Therefore, since the government admittedly failed to prove that Beecham's civil rights had not been restored under Tennessee law, its case was deficient and the jury's guilty verdict as to those counts for which a prior "conviction" was an essential element must be set aside.

IV. Conclusion.

For the foregoing reasons defendant's motion for judgment of acquittal in regard to counts one, three, four, five, seven and eleven is granted.

SO ORDERED.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
United States District Judge

January 24, 1992.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 91-84-01-CR-5-BR

UNITED STATES OF AMERICA

v.

LENARD RAY BEECHAM

ORDER

[Filed June 3, 1992]

The judgment in this matter entered on 1 June 1992 is hereby amended on page 1 to reflect that Counts 1, 3, 4, 5, 7 and 11 were dismissed by the court upon motion of the defendant.

Except as herein modified, the judgment is, in all respects, ratified and confirmed.

This 3 June 1992.

/s/ W. Earl Britt
W. EARL BRITT
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-5868
CR-91-84

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.

LENARD RAY BEECHAM,
Defendant-Appellant

ORDER

Filed November 23, 1993

Appellant has filed a motion for bail pending appeal.
The Court grants the motion.

Entered at the direction of Judge Hall with the concurrence of Chief Judge Ervin and Judge Hamilton.

FOR THE COURT

/s/ Bert M. Montague
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

Criminal No. 92-00046

UNITED STATES OF AMERICA,
Plaintiff,
v.

KIRBY LEE JONES,
Defendant.

Violation: 18 USC 922(g)(1)
18 USC 924(a)(2)
18 USC 922(a)(6)
18 USC 924(a)(1)(B)

INDICTMENT

[Filed March 3, 1992]

The Grand Jury charges that:

COUNT ONE

That on or about September 13, 1990, in Burnsville, Braxton County, within the Northern District of West Virginia, the defendant, KIRBY LEE JONES, being a person who had been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, that is to say, on or about October 30, 1969, KIRBY LEE JONES was convicted in the Circuit Court of Braxton County, West Virginia, in Case Number 343, of Breaking and Entering, a crime punishable by imprisonment for a term exceeding one year; on or about June

11, 1971, KIRBY LEE JONES was convicted in the United States District Court for the Southern District of Ohio, Columbus, Ohio, in Case Number 4546, of Transporting in Interstate Commerce a Stolen Automobile Knowing the Same to have been Stolen, a crime punishable by imprisonment for a term exceeding one year; and on or about August 30, 1978, KIRBY LEE JONES was convicted in the Circuit Court of Fayette County, West Virginia, in Case Number 78-F-58, of Forgery, a crime punishable by imprisonment for a term exceeding one year; did knowingly receive and possess a firearm, to wit: a Remington, Model 700BDL, .243 caliber rifle, Serial Number C6419679, which firearm had been shipped in interstate commerce; in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

COUNT TWO

On or about September 13, 1990, in Burnsville, Braxton County, West Virginia within the Northern District of West Virginia, the defendant, KIRBY LEE JONES, in connection with the acquisition of a firearm, that is a Remington, Model 700 BDL, .243 caliber rifle, Serial Number C6419679, from Anglers Roost Sport Shop, a federally licensed dealer in firearms, knowingly made a false and fictitious statement likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of the firearm pursuant to Chapter 44, Title 18, United States Code, in that he stated on a Department of Treasury, Bureau of Alcohol, Tobacco and Firearms Form 4473, that he was not prohibited by the provisions of Chapter 44, Title 18, United States Code, from receiving a firearm that had been shipped in interstate or foreign commerce, when in truth and in fact he was a person who had been convicted of crimes punishable by imprisonment for a term exceeding one year and was prohibited from receiving a firearm that had been shipped in interstate or foreign commerce by Chapter 44 of Title

18, United States Code; in violation of Title 18, United States Code, Sections 922(a)(6) and 924(a)(1)(B).

A TRUE BILL

/s/ Patrick W. Homer
Foreperson of the Grand Jury

/s/ Lisa A. Grimes
for WILLIAM A. KOLIBASH
United States Attorney

[STATE SEAL]

STATE OF WEST VIRGINIA
DEPARTMENT OF CORRECTIONS
CHARLESTON

OFFICIAL CERTIFICATE OF DISCHARGE

THIS IS TO CERTIFY THAT
KIRBY LEE JONES, HCC-10982

Is hereby discharged from parole and any or all civil
rights heretofore forfeited are restored.

Done this the 21st day of May 1982.

DEPARTMENT OF CORRECTIONS

/s/ William R. White
Deputy Commissioner

/dl

cc: Area D/7
HCC
Fayette County
File

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA

Criminal No. 92-00046

UNITED STATES OF AMERICA,
Plaintiff,

v.

KIRBY LEE JONES,
Defendant.

ORDER

Filed Nov. 4, 1992

Pending the Court's consideration of the Proposed Findings of Fact and Recommendation for Disposition filed by Magistrate Judge Core in the above-styled criminal action, the Court, in order to safeguard every eventuality of the Speedy Trial Act, scheduled the above-styled criminal action for trial on November 17, 1992. On November 2, 1992, the United States filed a Motion for Review and Appeal of the Proposed Findings of Fact and Recommendation for Disposition.

The Court has now had an opportunity to carefully review the government's motion and the findings and recommendation of the Magistrate Judge, filed with the Court on October 21, 1992, and the Court is of the opinion that the findings and recommendation of the Magistrate Judge as to the sufficiency of the charges contained in the within Indictment are a correct and accurate

statement of the law and the recommendation of the Magistrate Judge to the Court that the Indictment herein be dismissed is entirely appropriate. In reaching the conclusion that the United States Magistrate Judge has made a proper determination based upon the circumstances presented in this criminal action, the Court has carefully reviewed the record before it and has conducted a de novo review of all-matters before the Magistrate Judge. As reflected above, it appears to the Court that the Magistrate Judge's Proposed Findings of Fact and Recommendations for Disposition accurately reflect the law applicable to the facts and circumstances before the Court in this criminal action. The government's Motion for Review and Appeal has not raised any issue or issues which have not thoroughly and accurately been considered by the Magistrate Judge. Accordingly, it is

ORDERED that Magistrate Judge Core's Proposed Findings of Fact and Recommendations for Disposition filed in this case be, and the same are hereby, accepted in totality, and the defendant's Motion to Dismiss the Indictment be, and the same is hereby, GRANTED.

ENTER: November 4, 1992.

/s/ Robert E. Maxwell
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-5820
CR-92-46

UNITED STATES OF AMERICA,
Plaintiff-Appellant
v.

KIRBY LEE JONES,
Defendant-Appellee

ORDER

FILED June 14, 1993

Appellee has filed a motion to stay the mandate pending application to the United States Supreme Court for a writ of certiorari.

The Court denies the motion.

Entered at the direction of Judge Hall, with the concurrence of Judge Luttig and Judge Hilton.

For the Court,

/s/ Bert M. Montague
Clerk

[Emblem]

U.S. DEPARTMENT OF JUSTICE

*United States Attorney
Northern District of West Virginia*

Post Office Box 591
Wheeling, West Virginia 26003

July 8, 1993

R. Russell Stobbs
Attorney at Law
P.O. Box 1167
Weston, WV 26452

IN RE: UNITED STATES v. KIRBY LEE JONES
CRIMINAL NO. 92-00046

Dear Mr. Stobbs:

This letter will confirm the conversations with you concerning your client, KIRBY LEE JONES, (hereinafter referred to as Mr. Jones).

All references to the "Guidelines" refer to the guidelines established by the United States Sentencing Commission, effective November 1987, as amended.

The following numbered paragraphs indicate the substance of the agreement which has been discussed. It is accordingly agreed between the United States and Mr. Jones as follows:

1. Mr. Jones agrees to plead guilty to Count One of the Indictment charging him with Possession of a Firearm by a Convicted Felon, in violation of Title 18, United States Code, Section 922(g)(1).

2. The maximum penalty to which Mr. Jones will be exposed by virtue of his plea of guilty for a violation of Title 18, United States Code, Section 922(g)(1) as stated

in paragraph 1 above, is imprisonment for a period of ten (10) years, supervised release for a period of at least three (3) years, a fine of \$5,000.00 (statutory under 18 USC 922(g)(1)), or \$250,000.00 (alternative under 18 USC 3571(b)(3)), and a \$50.00 mandatory assessment. It is understood that, in the event Mr. Jones is incarcerated, he may be required by the Court to pay the costs of his incarceration. In addition, the defendant understands that the Court will impose a special assessment of \$50.00 for each felony conviction, and the defendant agrees the special assessment will be paid in full by certified check or money order and made payable to the United States District Court prior to the sentencing hearing.

3. Mr. Jones will be completely forthright and truthful with federal officials in the Northern District of West Virginia with regard to all inquiries made of him and will give signed, sworn statements and Grand Jury and trial testimony relative thereto. Mr. Jones will agree to submit to a polygraph examination if requested to do so by the United States Attorney's Office for the Northern District of West Virginia.

4. Nothing contained in any statement, or any testimony given by Mr. Jones pursuant to paragraph 3 herein will be used against him in any further criminal proceedings. However, this agreement does not prevent Mr. Jones from being prosecuted for any violations of other federal or state laws Mr. Jones may have committed should evidence of any such violations be obtained from an independent and legitimate source separate and apart from that information and testimony being provided by Mr. Jones pursuant to this agreement. In addition, nothing contained in this agreement shall prevent the United States from prosecuting Mr. Jones for perjury or the giving of a false statement to a federal agent, if such situation should occur by virtue of his fulfilling the conditions of paragraph 3 above.

5. At final disposition, the United States will advise the Court of Mr. Jones' forthrightness and truthfulness, or failure to be forthright and truthful, and ask the Court to give the same such weight as the Court deems appropriate. In addition, the United States will move to dismiss the remaining Count pending against Mr. Jones in Indictment No. 92-00046 now pending against the defendant in the Northern District of West Virginia. It is further understood that the United States Attorney's Office for the Southern District of West Virginia has agreed to dismiss all four (4) counts of Indictment No. 2:92-00186 now pending against the defendant in the United States District Court for the Southern District of West Virginia.

6. There have been no representations whatsoever by any agent or employee of the United States, or any other agency, as to what the final disposition in this matter should and will be. This agreement includes a *non-binding* recommendation by the United States, pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure. However, Mr. Jones understands that the Court is *not* bound by this sentence recommendation and that Mr. Jones has *no* right to withdraw a guilty plea if the Court does not follow the sentencing recommendation set forth in this plea agreement.

7. The United States will make the following *non-binding*

a. The United States will recommend that the Court credit the defendant with a reduction of two levels below the otherwise applicable guideline range for "acceptance of responsibility" as provided by Guideline 3E1.1.

8. If in the opinion of the United States, the defendant either engages in conduct defined under the Application Notes 1(a) through (e) of Guideline 3C1.1, fails to cooperate as promised, fails to tender for payment the special assessment prior to the sentencing hearing, or violates any other provision of this plea agreement, then the United

States will not be bound to make the foregoing recommendation, and the defendant will not have the right to withdraw the plea.

9. It is further understood that, by entering into this agreement, defendant is not waiving his right to file a Writ of Certiorari to the United States Supreme Court requesting that the Supreme Court overrule the decision of the United States Court of Appeals for the Fourth Circuit in Case No. 92-5820, *United States v. Kirby Lee Jones*.

10. The United States reserves the right to provide to the Court and the United States Probation Office, in connection with any presentence investigation that may be ordered pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, or in connection with the imposition of sentence should the Court, pursuant to Rule 32(c)(1), not order a presentence investigation, relevant information including Mr. Jones' background, criminal record, offense charged in the Indictment, and other pertinent data appearing at Rule 32(c)(2) of the Federal Rules of Criminal Procedure as will enable the Court to exercise its sentencing discretion. The United States also retains the right to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the anticipated presentence report to be prepared by the Probation Office of this Court, and to respond to any written or oral statements made to the Court by Mr. Jones or his counsel.

11. If Mr. Jones' plea is not accepted by the Court or is later set aside or if Mr. Jones breaches any part of this agreement, then the Office of the United States Attorney will have the right to void this agreement.

12. The above eleven (11) paragraphs constitute the entire agreement between Mr. Jones and the United States. There are no other agreements, understandings, or promises between the parties other than those contained in this agreement.

Very truly yours,
WILLIAM D. WILMOTH
United States Attorney

By: /s/ Lisa A. Grimes
LISA A. GRIMES
Assistant United States Attorney

LAG/djb

As evidenced by my signature at the bottom of the four (4) pages of this letter agreement, I have read and understand the provision of each paragraph herein and fully approve of each provision.

/s/ Kirby Lee Jones July 12, 1993
KIRBY LEE JONES

/s/ R. Russell Stobbs July 12, 1993
R. RUSSELL STOBBS
Counsel for Kirby Lee Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA

Criminal No. 92-46

UNITED STATES OF AMERICA,
Plaintiff,

v.

KIRBY LEE JONES,
Defendant.

ORDER

Filed Jul. 22, 1993

The Court has received a copy of a plea agreement in the above-styled criminal action wherein it is indicated that the defendant will enter a plea of guilty to Count One of the Indictment. Inasmuch as Paragraph Nine of the plea agreement reflects that the defendant will file a Petition for a Writ of Certiorari to the United States Supreme Court, it is

ORDERED that further action in this matter and consideration of the plea agreement shall be held in abeyance until the defendant's appeal is exhausted. It is further

ORDERED that the period of delay resulting from the appeal and from the Court's consideration of the issues raised and suggested by the said plea agreement shall be excluded in computing the time within which the trial of the offense charged in the above-styled criminal action

must commence in accordance with the provisions of 18
U.S.C. § 3161(h)(1)(E) an (I).

Enter: July 22nd, 1993.

/s/ Robert E. Maxwell
United States District Judge

/s/ Deputy Clerk